

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.930 OF 2015

Samadhan S/o Pandit Chaudhari,
Age-27 years, Occu:Labourer,
R/o-Near Varneshwar Mahadev Mandir,
Chopda Road, Amalner, Tq-Amalner,
Dist-Jalgaon.

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr. Girish V. Wani Advocate for Appellant.
Mrs. P.V. Diggikar, A.P.P. for Respondent.
...

**CORAM: SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 12th JANUARY, 2023

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Appeal has been filed by the original accused challenging his conviction by learned Additional Sessions Judge, Amalner, District-Jalgaon on 8th September 2015 in Sessions Case No.42 of 2012, after holding him guilty of committing offence under Section 302 and 323 of the Indian Penal Code. The

appellant has been sentenced to suffer imprisonment for life and to pay fine of Rs.5,000/-, in default to suffer rigorous imprisonment for two years, for committing offence under Section 302 of the Indian Penal Code and he has been further sentenced to suffer rigorous imprisonment for one year for the offence punishable under Section 323 of the Indian Penal Code. Both the sentences have been directed to run concurrently.

2. Heard learned Advocate Mr. Wani appearing for the appellant and learned APP Mrs. Diggikar appearing for the respondent – State.

3. It has been vehemently submitted on behalf of the appellant that the learned trial Judge has not appreciated the evidence properly. It is alleged that the present appellant has committed murder of his wife Sangita. Sangita was admitted in the hospital after she had allegedly sustained burn injuries. Her dying declarations have been recorded at Exhibit-34, 41, and 73. Exhibit-73 has been treated as First Information Report (for short "FIR"), which is stated to have been recorded by the police head constable. The learned trial Judge failed to consider the inconsistencies in three dying declarations. The other two dying

declarations i.e. Exhibit-34 and 41 are recorded by Naib Tahsildar – cum Executive Magistrates. It has been then alleged that the present appellant / husband had poured kerosene on the person of Sangita and set her to fire. Initially, the offence was registered under Section 307 of the Indian Penal Code, however, later on Sangita succumbed to the injuries and therefore, Section 302 of the Indian Penal Code came to be added. Prosecution has examined PW-6 Kokilabai, who is the neighbour of the deceased and appellant. She has deposed that around 2.30 a.m. she had heard the shouts of the deceased and when she went to the house of the deceased, she saw the deceased lying in burnt condition. She along with on Parvatibai, took deceased in rickshaw to hospital. The said witness has been believed by the trial Court, however, trial Court failed to consider that PW-6 Kokilabai had not mentioned that she has seen the accused in house. Same is the case with testimony of PW-7 Yogesh who is also the neighbour. The case of the prosecution was rested on the dying declarations but the learned trial Judge failed to consider that there is no attestation to the thumb impression on the dying declaration Exhibit-34. In respect of dying declaration Exhibit-41, PW-9 Ramesh Gulale has stated

that he had not asked to Sangita whether she can speak Marathi or not. Though it is stated that her thumb impression was taken but in the inquest panchnama it is not stated that the ink mark was present on the thumb. PW-10 Dr. Govind Patil is the medical officer who had certified about the health condition of the deceased at the time of recording dying declaration, but in his cross-examination he has admitted that due to the administration of the antibiotics the patient may remain partly conscious. He also admitted that the skin of the fingers of both the hands of Sangita was completely burnt, then the question arises as to how the thumb mark was obtained. The dying declarations ought not to have been believed by the learned trial Judge as those were not free from doubts. The conviction to the appellant, therefore, deserves to be set aside.

4. Per contra, the learned APP strongly opposed the Appeal and she supported the reasons given by the learned trial Judge. Learned APP submitted that all the prosecution witnesses have supported the case of the prosecution. The postmortem report Exhibit-55 and testimony of PW-11 Dr. Kapileshwar Chaoudhari, who had conducted the autopsy, would show that the deceased had sustained 49% burn injuries and the cause of death is

'septicemia due to burns', therefore, the death was homicidal in nature in view of the other facts proved. Admittedly, the deceased was residing with accused and their two years old child. The incident has occurred at 2.00 a.m. The wife should be treated as in the custody of the husband and when such incident has taken place at night time when the husband was supposed to be at home; there ought to have been an explanation about the circumstances, in view of Section 106 of the Indian Evidence Act, from the accused. The testimony of the prosecution witnesses do not indicate that any such defence was taken by the accused explaining those circumstances nor in his statement under Section 313 of the Code of Criminal Procedure there is any explanation by the accused. The neighbours have also been examined, who had gone to the spot immediately after the incident and there is nothing in their cross-examination which will disbelieve them. The three dying declarations i.e. Exhibit-34, 41 and 73 are not contrary to each other, rather those are consistent in stating that the accused had poured kerosene on the person of the deceased at night time and had set her to fire. The conviction awarded to the appellant is perfectly legal.

5. The first and foremost fact which we want to place on record is that PW-1 Kailash – panch to the spot panchnama, PW-3 Ramchandra Patil – panch to the seizure panchnama of clothes of deceased, PW-4 Sachin Jadhav – panch to the seizure of clothes of accused, PW-5 Rajendra Patil – panch to the inquest panchnama, have proved the respective documents and there is nothing which can be said to be contrary that has been brought on record in their cross-examination. PW-2, Police Constable Jainwant Patil is the person who had registered the offence on the basis of the dying declaration of the deceased, Exhibit-73.

6. PW-6 Kokilabai Lohar and PW-7 Yogesh Tayade are the neighbours of the appellant and deceased and their such status is not denied by the accused. They both have consistently stated that they had heard noise / shouts of the deceased Sangita around 2.30 a.m. about 2 to 2½ years prior to their deposition. They went to the house of Sangita. They found that Sangita had sustained burn injuries. They were the persons who had shifted Sangita to the hospital. It is pertinent to note that both of them have not stated that any oral dying declaration was given by Sangita to them. Their presence was natural. The learned Advocate for the appellant has harped upon the fact that both of

them have not stated that accused was present at the spot. In fact, this fact can also be seen from another angle that after the incident the accused might have fled away from the spot. In the cross-examination there was no pin pointing question about the presence or absence of the accused and therefore, the said point cannot be en-cashed in such a way. When the witness is available in the witness box then the questions will have to be asked and it cannot be left to the inferences by the witness or by the Judge himself / herself. Both the witnesses were knowing the appellant as husband of Sangita. They have not stated that accused had set wife Sangita on fire. That means, the testimony of these two witnesses is but natural and they have deposed to that extent only which they had seen. There is nothing to disbelieve in their testimony. Rather it is also consistent with other evidence on record that Sangita had received burn injuries and she was at home at 2.30 a.m. on 30th April 2012.

7. Now turning towards the point of dying declaration, it is trite law that sole dying declaration can be made basis of conviction, if at all it qualifies the test of truthfulness, voluntariness and if it is free from suspicion and doubt. There are various rulings of Hon'ble Apex Court regarding evidentiary

value of dying declaration. It has been held time and again that accused being deprived of cross-examination, Court has to be very careful and cautious while assessing dying declaration. It is expected that Court should be on guard that the statement of deceased was not a result of either tutoring, prompting or product of imagination. It is further expected of the Court to satisfy itself that the deceased was in a fit state of mind to give dying declaration. In the case of ***Paniben vs. State of Gujarat; (1992) 2 SCC 474***, the Hon'ble Supreme Court has laid down the principles governing dying declaration, which are as follows :-

- (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.
- (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.
- (iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration.
- (iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence.
- (v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail.

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.

8. The above principles are affirmed, relied, summarized and applied in various other rulings, namely ***Surinder Kumar vs. State of Punjab, (2012) 12 SCC 120, Madan vs. State of Maharashtra; (2019) 13 SCC 464.***

9. Similarly, very recently Hon'ble Apex Court in the case of ***Ganpat Bakaramji Lad vs. State of Maharashtra, 2018 ALL MR (Cri) 2249***, has also reiterated certain tests to be put to use before accepting that dying declaration. It has been held thus:-

“ In respect of the dying declaration, the general principles to be kept in mind are

(i) that it is not a weaker kind of evidence and it stands on the same footing as other evidence, and (ii) that there is no absolute rule of law that it cannot form the sole basis of conviction, unless corroborated by other independent evidence. The first step required to be taken in every case, is to consider the three-fold questions as under :

(a) Whether a declarant had an opportunity to observe and identify the assailant or the accused?,

(b) Whether a declarant was in a conscious and fit condition at the time of recording the statement?, and

(c) Whether the Court is so convinced of the truthfulness and voluntary nature of the statement of the declarant that it inspires confidence to such an extent that it can be the sole basis of conviction?

The absence of an endorsement in the dying declaration - (a) by a doctor regarding the fitness of mind of the declarant, or (b) that the statement was read over and explained to the declarant, who found it to be correct, cannot be the reason for holding that the dying declaration is unacceptable, if the Court is otherwise satisfied that such a dying declaration inspires confidence.

The rejection of the dying declaration cannot be on the solitary instance of absence of endorsement of reading over and explaining the declaration and the declarant confirming it to be true. It will always depend upon the facts and circumstances of each case. We are clearly of the view that it will be a cumulative effect of the facts and circumstances of the case, which will determine such issues. The presence or absence of a particular fact or circumstance or a situation in a given case may become significant, whereas it may become insignificant in another case. The mode and manner of appreciation of evidence differs from case to case, though the principles of appreciation of evidence may be the same. The perception of the matter in each case and the manner of the appreciation of evidence differs from person to person. Hence, there cannot be a strait-jacket formula or hard and fast rule which can be laid down.

Neither the provision of Section 32(1) of the Evidence Act nor any decision of the Apex Court prescribe any particular format in which a dying declaration is to be recorded. It can be oral as well as written. In case of oral dying declaration, the question of existence or insistence upon reading over and explaining the declaration to the deceased does not arise. If that be so, how can such insistence be in respect of written dying declaration? It is not the

requirement of any statute or of the decision of the Apex Court that a written dying declaration must contain a column to be duly filled in that the statements of the declarant are read over and explained to him and that he found it to be true and correct. Such a requirement therefore cannot be held as mandatory.

The observations in the cases of ***Shaikh Bakshu 2007 ALL SCR 2407*** and ***Kantilal (2009) 12 SCC 498***, are based on the facts and would not, therefore, constitute a precedent or a *ratio decidendi* or even an *obiter dicta* to hold that bearing such an endorsement in the dying declaration is must. In our view, it would be unjust to reject the dying declaration only on such hyper technical view, which hardly of any help in the matter of criminal trials. ”

10. Further, in ***Vithal vs. State of Maharashtra, (2006) 13 SCC 54***, it has been reiterated that in case of multiple dying declarations, if there is no inconsistency, the same are reliable. It has been further held that the mere fact that the accused who is alleged to have poured kerosene on the deceased was inimically disposed of towards the deceased cannot by itself be a fact to disbelieve the dying declaration or to throw out the prosecution case. In ***Ranjit Singh and others vs. State of***

Punjab, (2006) 13 SCC 130, it has been laid down that if there is an inconsistency between two dying declarations, the Court should apply rule of caution but the consistent part can be taken note of.

11. After taking note of the law on the point of dying declaration, it can be seen that in the present case there are three dying declarations i.e. Exhibit-34, 41 and 73. In addition to that, it also appears that at Exhibit-67 there is statement cum dying declaration of Sangita. The writers of all the dying declarations have been examined. PW-8 Pradeep Kulkarni, Residential Tahsildar is the writer of dying declaration Exhibit-34. PW-9 Ramesh Gulale, Naib Tahsildar is the writer of dying declaration Exhibit-41. PW-14 Satishchandra Jadhav is the then API who had got Exhibit-73 recorded as per the say of the deceased Sangita. Perusal of all the three dying declarations would show that deceased was consistent enough in saying that she was set to fire by the appellant at 3.00 a.m. In her dying declaration Exhibit-34 Sangita has stated that there was quarrel between herself and the accused on the count of serving dinner. In the dying declaration Exhibit-41 Sangita has added that the appellant had come after drinking liquor and then on the count

of meals he quarreled with her, poured kerosene on her person and set her on fire. In Exhibit-67, Sangita has stated that at the relevant time i.e. 2.00 a.m. on 30th April 2012, her husband asked her to serve meal. She served him the left over *Sabji* and *Roti* but he did not eat and started abusing, assaulting her and then when she tried to persuade him, he poured kerosene on her person around 3.00 a.m. and set her to fire. Further, in her dying declaration Exhibit-73 also Sangita has stated that at the relevant time i.e. about 3.00 a.m. on 30th April 2012 her husband quarreled with her on the count of serving meal and started assaulting her and when she asked as to why he has assaulted her, he poured kerosene on her person and set her on fire. Therefore, it cannot be said that there is any inconsistency in all the dying declarations.

12. As regards the dying declarations are concerned, to all the dying declarations the endorsement given regarding the health status of Sangita is by PW-10 Dr. Govind Patil. In his testimony he has stated that at the time of each dying declaration, he has examined Sangita and found her to be fit to give statement. The manner of giving endorsement is different in slight perspective, at one place it is at the beginning and end, whereas in some

case it is in the side margin of the document. All the dying declarations have been recorded on 30th April 2012, one after another and there is nothing in the cross-examination of PW-10 Dr. Govind Patil to suggest that any sedative was given to Sangita before the dying declarations were recorded. No doubt, he has stated that the saline with antibiotics was given to the patient but he denied the suggestion that due to antibiotic medicines the patient remains partly conscious. The treatment papers have been produced and there is absolutely no endorsement about any health deterioration in the same.

13. The testimony of PW-11 Dr. Kapileshwar Jadhav, who conducted the autopsy, would show that deceased had sustained 49% burn injuries and she had expired on 18th May 2012, that means after five days of the incident. Therefore, there was no question of ink mark on the thumb of the deceased when the inquest panchnama was carried out. The percentage of the burn injuries has been given. It is stated that to the head, neck, face the percentage of the injury is 4% and to the upper limb - right it is 08% and left it is 6%. To all the dying declarations the thumb mark is of left thumb, which had sustained only 6% burn injuries. Therefore, there is no reason to disbelieve all the dying

declarations. There is absolutely no inconsistency between those dying declarations and taking into consideration the above said legal position of law, the conviction can be based on the dying declarations.

14. Much has been stated about the intention and that the case ought to have been considered under the exceptions to Section 300 of the Indian Penal Code. It can be said in this respect that the knowledge of the act or consequences of the act should be known to a person and that is also ingredient of the offence. Pouring kerosene upon a person and then setting that person to fire would attribute knowledge to the person doing such act of the consequences that the person against whom such act is done, would die. Consumption of liquor or a person under the influence of liquor cannot be an exception to the same. If appellant wants to take such defence that he was incapacitated due to consumption of liquor, of the knowledge about the acts or consequences of his acts, then that defence should be put and proved specifically. Here, in his statement under Section 313 of the Code of Criminal Procedure, the appellant has not stated that he had come home under the influence of liquor and he has consumed so much liquor that it incapacitated him from knowing

the consequences of his own acts. Further, there is absolutely no explanation about the custodial death of the wife in the statement under Section 313 of the Code of Criminal Procedure. At night time the husband is supposed to be at home. If the husband intends to take the plea of alibi, he has to adduce positive evidence in that respect, which is not done in this case. When the wife had expired in the house, that too at the odd hours of early morning, explanation under Section 106 of the Indian Evidence Act was incumbent. We could not find any such explanation of the appellant.

15. The learned trial Judge has passed the reasoned Judgment and order considering all the points involved, on the point of offence under Section 302 and 323 of the Indian Penal Code and therefore, those findings need not be interfered with. We do not find any merit in the present Appeal. It deserves to be dismissed.

16. Accordingly, the Appeal stands dismissed.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE